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MICHAEL RODAK, JR.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-657

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, and Its Agent CHARLES TREMPER,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**For the Seventh Circuit**

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, and Its Agent CHARLES TREMPER,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals**
**For the Seventh Circuit**

Petitioners, Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, and its agent, Charles Tremper, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 25, 1972.

## OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in Appendix A hereto.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1972. A timely petition for rehearing *en banc* was denied on September 15, 1972, and this petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the Court below erroneously and unconstitutionally interpreted Section 8(b)(1)(B) of the National Labor Relations Act in complete disregard of the practical judgment of the Board as to congressional intent.

2. Whether the parties to collective bargaining should be prohibited from attempting to resolve jurisdictional disputes by private means by use of the most widely used method of voluntary arbitration—the National Joint Board.

3. Whether the Court below erroneously interposed the federal government as a third party in collective bargaining disputes, in contravention of the decisions of this Court.

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The pertinent constitutional provision involved is as follows:

Constitution of the United States, Fifth Amendment:

> ". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law; . . ."

The pertinent provisions of the National Labor Relations Act are:

> Section 8(b)(1)(B) of the National Labor Relations Act (29 U.S.C., Sec. 158(b)(1)(B)):
>
> "It shall be unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

and:

> Section 8(b)(3) of the Act (29 U.S.C., Sec. 158 (b)(3)):
>
> "It shall be an unfair labor practice for a labor organization or its agents—
>
> "(3) to refuse to bargain collectively with an employer * * *."

## STATEMENT OF THE CASE

Evansville Chapter of the Associated General Contractors of America (hereinafter called the Association), a corporation consisting primarily of employers engaged in the building and construction industry, bargains on behalf of its employer-members with labor organizations. For many years the Association has negotiated collective-bargaining agreements with petitioner, Ironworkers Local Union No. 103 (hereinafter called Petitioner). These contracts have provided, *inter alia*, for the submission of jurisdictional disputes to the National Joint Board for the Settlement of Jurisdictional Disputes (hereinafter called the National Joint Board). The most recent contract between the parties was operative from April 1, 1967 to March 31, 1970. This contract also contained the provision requiring the submission of jurisdictional disputes to the National Joint Board.

In September 1969, the National Joint Board was dissolved. The association then advised business agent Charles Tremper that the association would not be a party to any agreement establishing a new joint board. The association did not agree to participate in the new joint board, which was formed in April 1970 to replace the defunct board.

On February 11, 1970, representatives of the association and the petitioner held their first formal bargaining session toward the execution of a new contract. Many negotiating sessions were held between the parties. Since no new agreement was reached, petitioner went on strike when the old agreement expired on March 31, 1970.

Unfair labor practice charges were brought against petitioner by the association. Complaint was issued, hear-

ing held and the Trial Examiner found against petitioner and held that the resolution of jurisdictional disputes was not a mandatory subject of bargaining. The Board, affirming the Trial Examiner, found that petitioner had violated Section 8(b)(3) of the Act by maintaining an inflexible position with regard to its demand that all jurisdictional disputes be submitted to the National Joint Board. The Board, however, contrary to the Trial Examiner, found that the subject of a mechanism for the resolution of jurisdictional disputes is a mandatory subject of bargaining and hence one upon which a party may insist to impasse, and accordingly dismissed the complaint insofar as it alleged a violation of Section 8(b)(1)(B) of the Act.

On appeal the Court of Appeals reversed the Board, and by straining the meaning of "adjustment of grievances" in Section 8(b)(1)(B) of the National Labor Relations Act to include the "resolution of jurisdictional disputes." The court found petitioner had struck illegally in violation of the Act, though admittedly in good faith. The Court affirmed the Board on the finding of an 8(b)(3) violation.

## REASONS FOR GRANTING THE WRIT

**1. The Decision Below Raises an Important Issue of Statutory Construction Involving Significant and Recurring Problems Concerning Voluntary Methods of Resolving Jurisdictional Disputes, and Contravenes Ruling Precedent of This Court.**

The problem of resolving jurisdictional disputes is one of the most serious problems confronting labor and management today.

This Court has repeatedly ruled that where the interpretation of the National Labor Relations Act involves a practical judgment as to what is necessary to give effect to congressional intent, as to such issue the "judgment of the Board must be given great weight". **Local 1976, Carpenters v. N.L.R.B.**, 347 U.S. 93, 107 (1958); **N.L.R.B. v. United Insurance Co.**, 390 U.S. 254, 256, 260 (1968).

However the decision below completely disregarded the Board's practical judgment as to congressional intent in interpreting the Act.

The Board found, in the exercise of its practical judgment, that the Congress did not intend that Section 8(b)(1)(B) was applicable to the situation here. It found that the panel provided for by the National Joint Board is not engaged in "collective bargaining" or the "adjustment of grievances".

It took note of the fact that its decision followed the statutory scheme which incorporates the preference for private means of resolving jurisdictional disputes, where the parties agree to such methods.

It undoubtedly took into consideration the fact that President Nixon expressed the Administration's deep commitment to the institution of free collective bargaining,

when he established the Construction Industry Collective Bargaining Commission in 1969, and when Secretary of Labor Schultz commended the revitalization of the twenty-two year old National Joint Board which "strengthened the construction industry's machinery for dealing with these troublesome and costly disputes". He pointed out, as the Record shows, that the National Joint Board was endorsed by the Construction Industry Collective Bargaining Commission and was a vital means of "helping private action to solve this troublesome problem". (A. 202A-203A).

The decision of the Court below completely nullifies many years of effort to reach this desirable means of attempting to resolve this problem, and completely disregards the practical judgment of the Board.

The opinion of the Court below would seriously disrupt collective bargaining, because as the Board noted in its decision, Petitioner's proposals—that is, the use of a tripartite panel and the designation of an arbitrator (as opposed to providing machinery through which an arbitrator may be designated in the future)—are both common provisions in collective bargaining agreements. Merton C. Bernstein, **Private Dispute Settlement** (The Free Press, New York, N.Y., 1968, pp. 278-282); **Collective Bargaining Negotiations and Contracts** (Bureau of National Affairs, Washington, D.C.), pp. 51: 6-7.

Accordingly, Petitioner would have lost its right to bargain to impasse to secure such a clause only if the presence of a management member on the arbitration panel proposed by it limited the association in "the selection of (its) representatives for the purposes of collective bargaining or the adjustment of grievances." For, only if it did, so limit the association would demanding such a clause violate Section 8(b)(1)(B) of the Act, and hence bargaining to impasse for such a clause would violate Section 8(b)(3). This issue, therefore, turns on statutory

construction—that is, a determination whether the management member of a tripartite arbitration panel is a "representative" of the employer party and whether the arbitration constitutes an "adjustment" of the grievance as that term is used in Section 8(b)(1)(B). The interpretation of the Act thus involves a practical judgment as to what is necessary to give effect to Congressional intent.

In determining that Section 8(b)(1)(B) was not applicable to the situation here, the Board noted that the management panel-member is apparently intended to be "disinterested" (although "knowledgeable") rather than to function as the "representative" of the employer involved in the dispute. For the most appropriate "representative" would be an official of the employer party, yet such an official is specifically disqualified from sitting. The Board further noted that the panel is not engaged in "collective bargaining" or the "adjustment" of grievances "for the function of any group designated to resolve such jurisdictional disputes is not to negotiate on behalf of the parties before it but is more in the nature of an umpire or a knowledgeable arbitration panel to consider only certain types of problems." This reading of "adjustment" as relating to that part of grievance handling which involves the give and take of bargaining is in accord, not only with the statutory context—that is, the pairing of "collective bargaining" and grievance "adjustment"—but also with the legislative history, which paraphrases "representatives for the (purposes) of . . . the adjustment of grievances" as "a personnel director or supervisor who has been delegated the function of settling grievances". **Legislative History of the Labor Management Relations Act**, 1947 (Government Printing Office, 1948), p. 427; **Senate Rept. No. 105 on S. 1126**, 80th Cong., 1st Sess., p. 21.

If, as the Court apparently concedes, a provision for arbitration is a mandatory subject of bargaining, the

designation of an arbitrator must also be a mandatory subject, for otherwise a party could immediately agree to arbitration in principle and then adamantly reject any proposed arbitrator. On the other hand, while the Board's decision gives the association no voice in the composition of National Joint Board panels, the association retains its voice in the selection of the arbitrator—that is, whether the National Joint Board or some other arbitral agency is to resolve the dispute.

The decision of the Court below by, in effect, preventing petitioner from using the most widely accepted means of resolving jurisdictional disputes for the past twenty-two years, represents serious impediment to collective bargaining and creates the danger of greatly increasing the amount of jurisdictional disputes.

This would greatly upset past patterns of labor relations, and create much instability in existing labor patterns.

Further, by disregarding the Board's practical judgment in this matter, the Court below has failed to follow the decisions of this Court in **Local 1976 Carpenters v. N.L.R.B.**, 357 U.S. 93, 107 (1958), and **N.L.R.B. v. United Insurance Co.**, 390 U.S. 254, 256, 260 (1968).

**2. The Decision Below Has the Effect of Rendering Section 8(b)(1)(B) of the Act Unconstitutional and of Interposing the Federal Government as the Third Party in Collective Bargaining and Contravenes Decisions of This Court to the Contrary.**

The decision of the Court below by interpreting the words "adjustment of grievances" in the statute, to include "resolution of jurisdictional disputes" introduces such uncertainty into the Act as to violate elementary con-

stitutional principles of due process because of vagueness and uncertainty. By virtue of the decision below, no one can know what "adjustment of grievances" in the Act really means.

The Court below cites no authority, neither judicial nor by way of statutory history, to support its distortion of the statutory phrase "adjustment of grievances" to include the "resolution of jurisdictional disputes."

No Court has so construed this language. Such construction renders the ordinary meaning of these words so vague and uncertain as to make it impossible to ascertain the statutory meaning, and violates elemental principles of due process, in contravention of the Fifth Amendment.

> **United States v. C.I.O.**, 335 U.S. 106, 150-155; **Lanzetta v. New Jersey**, 306 U.S. 451 (1939); **Musser v. Utah**, 333 U.S. 95, 97 (1948); **Cf.** Collings, **Unconstitutional Uncertainty, An Appraisal**, 40 Cornell L.Q. 195 (1955).

Further, this Court has squarely held that ". . . it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands." **H. K. Porter Co., Inc., Disston Division-Danville Works v. National Labor Relations Board et al.** 397 U.S. at 99 (1970). Yet the decision of the Court below in effect requires the Board to review proposals for collective bargaining agreements where jurisdictional disputes are involved.

Further, the decision of the Court below, by finding that the strike engaged in by the petitioner was an unfair practice, in effect forbids petitioner from relying on its economic strength to try to secure what the association did not agree to through bargaining. Yet this Court has

held that this is improper and that unions and employers may rely on strength to secure what cannot be obtained through bargaining. **H. K. Porter Co. v. NLRB**, 397 U.S. at 99 (1970).

Finally, the Court's opinion completely disregards the statutory scheme, which incorporates the preference for private means of resolving the dispute, if the parties agree to such a method. Nothing in the statute or the legislative history indicates that the agreement in this respect is not subject to the ordinary give and take of bargaining. Accordingly, while the ultimate selection of an arbitrator must be mutual, such an agreement is not ordinarily regarded as unilaterally imposed when the issue is thrashed out in good faith bargaining, even though the parties resort to the use of economic pressure. The decision of the Court below therefore contravenes the decisions of this Court in **N.L.R.B. v. Katz**, 369 U.S. 736 (1962); **H. K. Porter Co., Inc. v. N.L.R.B.**, 397 U.S. 99 (1970); **N.L.R.B. v. Insurance Agents' International Union**, 361 US. 477 (1960).

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted

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October 1972

## APPENDIX A

In the United States Court of Appeals
For the Seventh Circuit

September Term, 1971 — April Session, 1972

No. 71-1480

Associated General Contractors of America, Evansville Chapter, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

No. 71-1575

National Labor Relations Board,

Petitioner,

v.

Local Union No. 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, etc., et al.,

Respondents.

On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board.

Argued April 4, 1972—Decided July 17, 1972

Before CUMMINGS, and STEVENS, *Circuit Judges*, and CAMPBELL, *Senior District Judge*.[1]

CUMMINGS, *Circuit Judge*. The first of these cases arises on the petition of Associated General Contractors of America, Evansville Chapter, Inc. ("Association") to review

[1] Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the Board's order reported in 190 NLRB No. 145. The other case comes here upon the Board's petition to enforce the order. In the Labor Board proceedings, the Association was the charging party. It is a corporation comprised of employers engaged in the building and construction industry, and it represents them in collective bargaining with labor organizations, including the Iron Workers' Union.[2]

Over the years, the Association has negotiated collective bargaining contracts with the Union, and these contracts have been adopted by its employer-members as well as non-member contractors employing iron workers in the Evansville, Indiana, area. The most recent contract between the Association and Union was in effect from April 1, 1967, to March 31, 1970, and Article VIII thereof carried forward a previous contractual provision requiring the submission of jurisdictional disputes to the National Joint Board for the Settlement of Jurisdictional Disputes ("National Joint Board"). The National Joint Board was comprised of an equal number of employer and union designates under the chairmanship of an impartial member. The Association and the Union were then represented on the National Joint Board through their parent organizations.[3]

The National Joint Board was dissolved in September 1969. The Association then advised Charles Tremper, the Union's Business Agent, that the Association and its parent would not be parties to any agreement establishing a new joint board, nor did they agree to participate in the Interim Joint Board which was formed in late 1969 to replace the National Joint Board. On the ground that its

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[2] Local Union 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.

[3] Associated General Contractors of America, Inc. and the International Association of Bridge, Structural and Ornamental Iron Workers.

parent would not permit the Local to be a party to an area board, the Union refused to discuss an Evansville facility to settle jurisdictional disputes, as suggested by the Association.

In February 1970, the Association and Union began to negotiate a new contract. They discussed Article VIII of the previous contract. That article, dealing with craft jurisdiction, provided:

> "It is agreed that the jurisdiction of work covered by this Agreement is that provided for in the Charter Grant issued by the American Federation of Labor to the International Association of Bridge, Structural and Ornamental Iron Workers, it being understood that the claims are subject to Trade Agreements and final decisions of the AFL-CIO, as well as the decisions rendered by the National Joint Board for the Settlement of Jurisdictional Disputes.
>
> "The parties to this Agreement are subject to and agree to be bound by all decisions and awards made by the National Joint Board for Settlement of Jurisdictional Disputes with respect to all jurisdictional disputes which may arise under this Agreement."

The Association informed the Union that it would not agree to such an article in the new contract because the National Joint Board had been dissolved and the Association's parent was not a party to the Interim Joint Board. In turn, the Union told the Association that the contract would have to provide for the resolution of jurisdictional disputes by the Interim Joint Board or its successor.[4] The Association's alternative was that in the event of a jurisdictional dispute, local representatives of the parties would meet to settle it, or if the Association's parent

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[4] Effective April 3, 1970, the Interim Joint Board was replaced by a new National Joint Board. On this board, another employers' organization signatory succeeded to the position formerly held by the Association's parent on the old National Joint Board.

and the Building and Construction Trade Department, AFL-CIO, agreed to a voluntary plan for the settlement of jurisdictional disputes, the plan would be effective immediately as to the Association and the Union. At subsequent negotiating sessions, the Union insisted on the Association's submitting to the Interim Joint Board or the new National Joint Board, whereas the Association opposed such a provision because its parent was not a party thereto. On March 31, 1970, the parties agreed that they had reached an impasse with respect to this subject, and the collective bargaining contract expired at midnight. The next morning the Association's member employers were struck by the Union, and the work stoppages were still in effect at the time of the July 7, 1970, hearing before the trial examiner.

After the strikes had occurred, various meetings were held by the parties, but they again could not agree on the jurisdictional dispute issue. At one of these meetings, the Union offered a "substitute" for the former provision providing for the settlement of jurisdictional disputes by the National Joint Board, but the substitute was substantially identical to Article VIII.[5] The Association therefore refused to accept it and offered various counterproposals that were refused by the Union.

On April 29, 1970, the local Building and Construction Trades Council, chaired by Union Business Agent Tremper, passed a resolution insisting that its affiliates and all contractors must abide by the decisions of the new National Joint Board that had been formed that month without Association representation. The resolution was adopted to cause the Association to agree to the National Joint Board method of resolving jurisdictional disputes. On May 14, 1970, Tremper told the press that the issue of the National Joint Board for the settlement of jurisdictional disputes was more important than money, and

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[5] See note 19, *infra*.

that the iron workers had not yet discussed wage issues with the Association. Wages were eventually discussed at the final negotiating meeting on June 29, 1970, but the Association's offer of a wage increase was rejected by the Union.

The Trial Examiner concluded that the Union's bargaining to the point of impasse and then striking to compel the Association "to agree that any jurisdictional disputes be resolved by a board on which the [Association] * * * had no representation" contravened Section 8(b)(1)(B) of the Act (29 U.S.C. § 158(b)(1)(B)), making it an unfair labor practice for a labor organization to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances. He also concluded that the Union's insistence on the inclusion of a provision in the collective bargaining agreement for the resolution of jurisdictional disputes by the Interim Joint Board or the new National Joint Board violated Section 8(b)(3) of the National Labor Relations Act (29 U.S.C. § 158 (b)(3)), making it an unfair labor practice for a labor organization to refuse to bargain collectively with an employer, because such a provision was a non-mandatory subject to collective bargaining.[6] In contrast, the Board found that the Union's demand was a mandatory subject for bargaining and that the Union's insistence upon it and striking for it did not violate Section 8(b)(1)(B). However, the Board concluded that the Union's position on this subject was not open-minded but was fixed and inflexible and contrary to its duty to bargain in good faith

[6] Although the Board interpreted the Trial Examiner's decision as holding that the entire subject of the mechanism for the resolution of jurisdictional disputes was non-mandatory (190 NLRB No. 145 at p. 4), it appears that the Trial Examiner merely decided that by insisting on the proposal that jurisdictional disputes be settled by a tripartite board on which the Association had no representation, conduct he had found violative of Section 8(b)(1)(B), the Union was insisting on a non-mandatory bargaining subject.

and therefore constituted an unfair labor practice under Section 8(b)(3). Accordingly, the Union and its business agent were required to cease and desist from refusing to bargain with the Association with regard to the resolution of jurisdictional disputes, and the Union was ordered to notify the Association that "it will not refuse to bargain [with the Association] on the resolution of jurisdictional disputes," and to post notices to this effect. In dissenting in part, two of the five Board members expressed the view that Section 8(b)(1)(B) had been violated, whether or not the proposal for submission of jurisdictional disputes to the Interim or new National Joint Boards was a mandatory subject of bargaining.

*Section 8(b)(1)(B) Violation*

As shown, the Trial Examiner found that the Union had restrained or coerced an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) by "bargaining to the point of impasse and then striking to compel it [Association] * * * to agree that any jurisdictional disputes be resolved by a board" on which none of the management representatives was chosen or designated by the Association. In agreement with the Trial Examiner and with the two dissenting members of the Labor Board, we hold that Section 8(b)(1)(B) was violated by this demand.

The statutory phrase "adjustment of grievances" is clearly broad enough to include adjusting jurisdictional disputes.[7] Nothing in the statute or its history demon-

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[7] Section 8(b)(1)(B) provides:

"It shall be unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." (29 U.S.C. § 158(b)(1)(B))

strates that Congress intended to tolerate coercing the designation of adjustment representatives not of the employer's own choosing where the subject matter of the grievance happens to be a jurisdictional one. Neither the Board nor the Union has shown why "adjustment of grievances" encompassed by the Section should be interpreted to exclude the adjustment of jurisdictional disputes. Jurisdictional disputes are distinct because they are at least three-cornered rather than bilateral and because they involve conflicting work claims between unions rather than some other controversy. However, neither of these differences is relevant to the interpretation of "adjustment of grievances." What is relevant is that jurisdictional disputes involve actual labor grievances in which the employer may be vitally interested and to which he is a party. See *National Labor Relations Board v. Plasterers' Union*, 404 U.S. 116; *Lathers Union Local 104*, 186 NLRB No. 70 at p. 8. The employer's presence may indeed contribute toward a particular resolution of the work jurisdiction dispute. He should be just as entitled to make his presence felt through representatives of his choice in the adjustment of this type of grievance as he is in any other.

The Board principally argues that Section 8(b)(1)(B) was not violated because the Association was not coerced in the selection of its "representatives" within the meaning of the statute. Here the Association was unwilling to submit to a tripartite Joint Board on which neither the Association nor its parent was represented. For the reasons which will follow we cannot accept the Board's position that the management members of a tripartite arbitration panel are not "representatives" of the employer within the scope of Section 8(b)(1)(B).

The Labor Board's claim that the employer and union members of the Joint Board are not "representatives" of the party designating them is belied by the very

nomenclature of the plan in question. Article II, Section 2, paragraph 2 provides for "four regular and four alternate employer members, who shall be *representatives of* and selected by the Participating Contractors Employer's Associations."[8] Article II, Section 3, states: "It is understood that in signing this agreement the parties agree to bear their appropriate share of the Joint Board's expense and to furnish *their representatives* on the Joint Board and Hearing Panels hereinafter provided for this agreement."[9] Certainly the words of Section 8(b)(1)(B) must be accorded their plain common-sense meaning. Thus unless there is some reason to suppose that "representative" as used in the plan carries a meaning other than its ordinary one, the employer members of the tripartite Joint Board should be considered his "representatives" within the meaning of Section 8(b)(1)(B).

Surely the parties to the Joint Board plan cannot be supposed to have endowed "representative" with a meaning other than its natural intendment. As the New York Court of Appeals has succinctly put it, "In fact, the very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal." *Astoria Medical Group v. Health Ins. Plan of Greater New York*, 11 N.Y. 2d 128, 227 N.Y.S.2d 401, 405, 182 N.E.2d 85 (1962). This is as true for the employers signatory to the Joint Board Plan as for the unions participating in it. The Supreme Court's recent opinion in *National Labor Relations Board v. Plasterers' Union*, 404 U.S. 116, 125, emphasized the intense concern and substantial stakes employers may have in the resolution of work jurisdiction disputes. Because of their justifiable interest, the employers must have intended that the board members they designate as their

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[8] Quoted in the *amicus* brief of the parent Association at p. 9; emphasis supplied.

[9] *Id.*

representatives actually advocate their viewpoints in resolving particular jurisdictional disputes.

The Labor Board characterized the tripartite Joint Board as "more in the nature of an umpire or knowledgeable arbitration panel" and thus concluded that its members should not be considered representatives. Whatever validity that blanket characterization might have as applied to the collective Joint Board, only the Chairman is truly impartial.[10] We would be closing our eyes to the realities of labor life if we did not recognize that the employer members would be expected to espouse the viewpoint of the employer party, whereas the union members would be expected to represent the viewpoint of the union party. In truth, the management and union representatives on a tripartite board are actually advocates for the respective parties even though, as here, the parties themselves may not participate in the decision by the tripartite body. As the Committee on Ethics of the National Academy of Arbitrators has stated, "It is common knowledge that the members [of tripartite boards of arbitration] designated by the parties almost invariably view the cases as partisans, though purporting to sit as impartial judges * * *."[11] Thus the partisan members of such boards will

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[10] The Joint Board Plan itself refers to the Chairman as the "impartial" chairman (Art. II, Sec. 1), and to the "impartial umpire" on the Appeals Board (Art. II, Sec. 5). Quoted in the *amicus* brief of the parent Association at p. 10.

[11] "Standards of Conduct for Labor Arbitrators," *The Profession of Labor Arbitration, Selected Proceedings of the First Seven Annual Meetings, National Academy of Arbitrators*, 143-44 (J. McKelvey ed. 1957). See *Federated Employers of Nevada, Inc.*, 135 NLRB 462, 470 (1962); *United Ass'n of Journeymen, Plumbing and Pipe Fitting Industry Local 525* v. *Eighth Judicial Dist. Ct. of Nevada*, 412 P.2d 352, 354 (Nev. Sup. Ct. 1966); *Astoria Medical Group* v. *Health Ins. Plan of Greater New York*, 11 N.Y.2d 128, 227 N.Y.S.2d 401, 404-405, 182 N.E.2d 85 (1962); *West Town Bus Co.* v. *Street Elec. Ry. and Motor Coach Employees*, 26 Ill.App.2d 398, 408-409, 168 N.E.2d 473 (1960); Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 Harv. L.Rev. 293, 296-297 (1954).

attempt to ensure that the neutral chairman understands the positions of the respective parties they represent and the virtues of those positions before he prepares the award. Such members will then ordinarily concur or dissent, depending upon whether or not the decision is favorable to their side.[12] Moreover, it would take an extreme naïveté about tripartite arbitration to believe that the partisan members will never attempt to reach a compromise solution after the dispute has been submitted to the panel.[13] Consequently, the majority of the Labor Board is wrong in treating the Union's demand here as for an "umpire" rather than for the acceptance of management representatives not of the Association's choosing.

Finally, as the dissenting Board members persuasively stated:

> "[I]t is fundamental that the party to any dispute or grievance be accorded the right to appoint his own representative if the voluntary settlement procedures they may agree upon are to maintain their efficacy. Therefore, in our view, it is irrelevant whether the designees being forced upon the employer are fair and impartial, for Section 8(b)(1)(B) protects the employer's right to select his own representatives for such purposes."

In summary then, in our judgment, Section 8(b)(1)(B) prohibits a union from compelling a group of employers to accept a new tripartite tribunal to adjust jurisdictional grievances where, as here, they have no representative on the tribunal and did not participate in its formation. See *Federated Employers of Nevada, Inc.*, 135 NLRB

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[12] AAA Case No. 31-13 at 31 AAA Arb. Awards Summary 4.

[13] See Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 Yale L.J. 31, 48 (1934); Note, *The Function of Arbitration in the Settlement of Industrial Disputes*, 33 Colum. L.Rev. 1366, 1372-1373 (1933).

462 (1962);[14] *Roofers Local 220 (Jones and Jones, Inc.)*, 177 NLRB No. 74 (1969);[15] cf. *National Labor Relations Board v. Falls Dodge, Inc.*, 431 F.2d 33, 35 (6th Cir. 1970). The Union's conduct here was precisely that prohibited by the statute.

*Section 8 (b) (3) Violation*

Since the Union's insistence that the Association agree to jurisdictional dispute settlement by the Interim and new National Joint Boards violated Section 8(b) (1) (B), there is no need to make a threshold determination that this provision was a non-mandatory bargaining subject in order to make out a Section 8(b) (3) violation,[16] as the Trial Examiner did. If the Union's coercion of the Association to accept a contract term is itself otherwise illegal—here because violative of Section 8(b) (1) (B)—insistence on that term as a condition to agreement is *ipso facto* illegal as a "refusal to bargain collectively with an employer" in violation of Section 8(b) (3). See *Typographical Union v. National Labor Rela-*

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[14] The Board majority seeks to distinguish *Federated Employers of Nevada, Inc.* because the trial examiner there did not decide whether "coercion to compel an employer to select or agree to an 'umpire' * * * is within the reach of Section 8(b)(1)(B)." But the present case, like that one, involves management designees to tripartite arbitration panels who are not of the Association's choosing. 135 NLRB at 470-476. As in that case, the question before us does not concern the appointment of a neutral party to serve as an impartial chairman of a tripartite board.

[15] See also *United Slate, Tile and Composition Roofers (Jones & Jones, Inc.)*, 172 NLRB No. 249 (1968); *Southern Calif. Pipe Trades (Aero Plumbing Co.)*, 167 NLRB 1004 (1967); *Painters Dist. Council No. 36*, 155 NLRB 1013 (1965); *Metropolitan Dist. Council of Phila. (McCloskey & Co.)*, 137 NLRB 1583 (1962).

[16] Section 8(b)(3) provides:
or its agents—

"It shall be an unfair labor practice for a labor organization

"(3) to refuse to bargain collectively with an employer * * *." (29 U.S.C. § 158(b)(3))

*tions Board*, 365 U.S. 705, affirming in part 278 F.2d 6 (1st Cir. 1960); *General Elec. Co. v. National Labor Relations Board*, 412 F.2d 512, 520 (2d Cir. 1969); *National Labor Relations Board v. Amalgamated Lithographers of America*, 309 F.2d 31, 42 (9th Cir. 1962), certiorari denied, 372 U.S. 943; *Prudential Ins. Co. of America v. National Labor Relations Board*, 278 F.2d 181, 182-183 (3d Cir. 1960); *Federated Employers of Nevada, Inc., supra* at 463, 471. The Union's good faith but mistaken belief that its adamant demand for inclusion of its jurisdictional dispute settlement clause was not unlawful affords no defense to a charge of refusal to bargain. *National Labor Relations Board v. My Store, Inc.*, 345 F.2d 494, 498 n. 2 (7th Cir. 1965), certiorari denied, 382 U.S. 927; *National Labor Relations Board v. Amalgamated Lithographers of America, supra; Taylor Forge & Pipe Workers*, 234 F.2d 227, 231 (7th Cir. 1956), certiorari denied, 352 U.S. 942.

On the assumption that there was no violation of Section 8(b) (1) (B) and that the Union's Joint Board proposal was a mandatory bargaining subject, the Labor Board concluded that the Union nevertheless violated Section 8(b) (3) because it had assumed "a fixed, inflexible position and was rigidly unwilling to consider seriously any possible alternatives to its proposal that such disputes be submitted to the National Joint Board." 190 NLRB No. 145 at pp. 6-7. This posture it found to be inconsistent with the Union's statutory obligation to bargain in good faith.[17] Although our holding makes it unnecessary to travel this route in order to sustain a Section

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[17] Section 8(d) provides in pertinent part:

"For the purposes of this action, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * *." (29 U.S.C. § 158(d))

8(b) (3) infraction, we think the Labor Board was correct in concluding the Section was violated in this respect as well.

As Judge Swygert pointed out in *National Labor Relations Board v. Generac Corporation*, 354 F.2d 625, 628 (7th Cir. 1965), the obligation imposed by Section 8(b) (3) upon the Union to bargain in good faith with the Association necessitates "a willingness to negotiate toward possibility of effecting compromises."[18] Here the Board had ample evidence from which to conclude that the Union did not discharge this statutory obligation. As shown in the above statement of facts, at the various bargaining sessions the Association offered several alternative proposals for settling jurisdictional disputes. Each was summarily rejected by the Union without serious consideration. The only such alternative proposed by the Union actually provided that disputes of this nature would have to be resolved by the National Joint Board and would have engendered further jurisdictional disputes.[19] The record simply does not support the Union's belated contention that it offered other genuine alternatives. As additional evidence of the Union's obdurateness the Board points to the statement of Union Business Agent Tremper,

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[18] See also *National Labor Relations Board* v. *Insurance Agents International Union*, 361 U.S. 477, 485, 486; Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L.Rev. 1401, 1411-1412 (1958); Note, *Union Refusal to Bargain, Section 8(b)(3) of the National Labor Relations Act*, 71 Harv. L.Rev. 502 (1958).

[19] This proposal offered by the Union as an "alternative" to Article VIII included the adoption of a section of the International Union's "General Working Rules" defining the craft jurisdiction of the iron workers. The last sentence of that section provided: "The above claims are subject to trade agreements and decisions of the National Joint Board for the Settlement of Jurisdictional Disputes." Because of the proposal's actual identity with Article VIII and because the work claims contained in the section were "at odds with some of the jurisdictional claims of other craft unions," thus inviting jurisdictional disputes, the Association rejected the proposal.

made a few hours before the expiration of the contract, that the Union should not even be bargaining with the Association. The implied threat to cut off negotiations entirely for failure to agree to the Union's Joint Board demands is telling. Although neither party is obligated "to agree to a proposal or * * * [to] the making of a concession" (Section 8(d)), the evidence here supports a finding of the Union's intransigent, unwillingness to consider seriously any compromise. Therefore, even without our conclusion that Section 8(b) (1) (B) was violated, we would affirm the Board's Section 8(b) (3) conclusion.

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In No. 71-1480, the Board's decision with respect to Section 8(b)(1)(B) is set aside and the cause is remanded to the Labor Board for the entry of an order restraining the violation of that Section. In No. 71-1575, the Board's petition for enforcement is granted, but the cause is remanded to the Labor Board to modify its order so as to restrain also the violation of Section 8(b)(3) inherent in the Union's insistence that the Association agree to the resolution of jurisdictional disputes by a tripartite board on which the Association is unrepresented.

A True Copy:

Teste:

Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit

By Mary Ann Chou
Deputy Clerk

## APPENDIX B

United States Court of Appeals
For the Seventh Circuit

| | |
|---|---|
| Associated General Contractors of America, Evansville Chapter, Inc., Petitioner, v. National Labor Relations Board, Respondent. | No. 71-1480 |
| National Labor Relations Board, Petitioner, v. Local Union No. 103, Int'l Assn. of Bridge, Structural and Ornamental Iron Workers, Etc., et al., Respondents. | No. 71-1575 |

## JUDGMENT

(Filed Aug. 25, 1972)

Before Cummings and Stevens, Circuit Judges and Campbell, Senior District Judge.[1]

This Cause came on to be heard upon the petition for review filed in Cause No. 71-1480 by Associated General Contractors of America, Evansville Chapter, Inc., petitioner, in which the National Labor Relations Board was respondent, and upon the application for enforcement filed in Cause No. 71-1575 in which the National Labor Relations

[1] Senior District Judge William J. Campbell of the Northern District of Illinois, sitting by designation.

Board is petitioner and Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and its agent Charles Tremper are respondents. The Court heard argument of respective counsel on both matters on April 4, 1972 and has considered the briefs and transcript of record filed in this cause. On July 17, 1972 the Court, being fully advised in the premises, handed down its decision, which on consideration whereof, in Cause No. 71-1480 the Board's decision with respect to 8(b)(1)(B) is set aside and the cause is remanded to the Labor Board for the entry of an order restraining the violation of that section. In Cause No. 71-1575, the Board's petition for enforcement is granted, but the cause is remanded to the Labor Board to modify its order so as to restrain also the violation of Section 8(b)(3).

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that this cause be remanded to the National Labor Relations Board in both proceedings involved herein and that the Board as respondent in Cause No. 71-1480 and petitioner in Cause No. 71-1575 be required to enter an order against Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO and its agent Charles Tremper, and its officers, agents, successors and assigns in accordance with the opinion.

Walter J. Cummings
Judge, United States Court of
Appeals for the Seventh Circuit

John Paul Stevens
Judge, United States Court of
Appeals for the Seventh Circuit

William J. Campbell
Judge, United States Court of
Appeals for the Seventh Circuit

A True Copy:

Teste:

Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit

By Mary Ann Chow
Deputy Clerk

NOV 4 1972

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-557

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, and Its Agent, CHARLES TREMPER,
*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.,
*Respondents.*

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Seventh Circuit

SYDNEY L. BERGER
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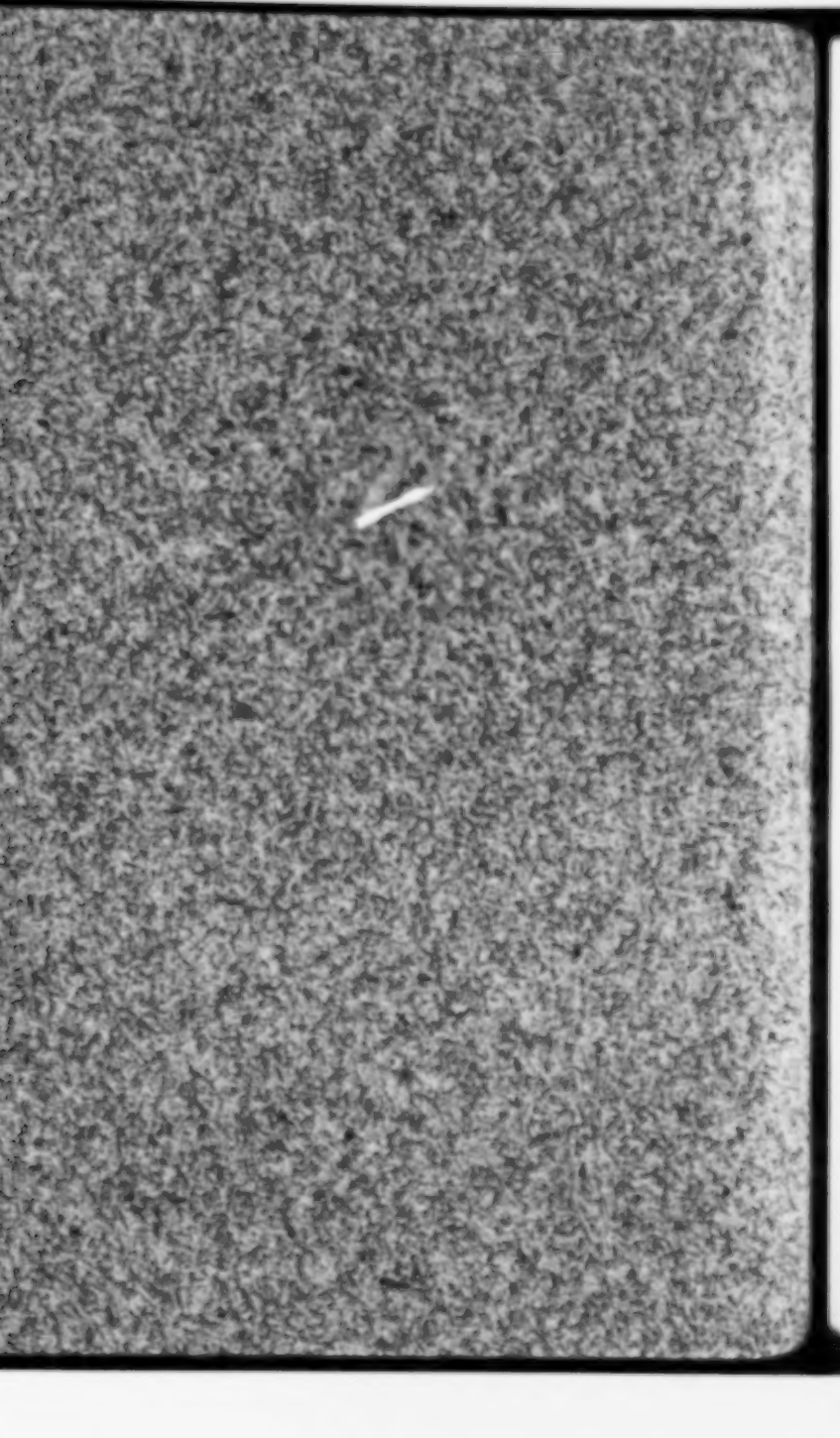
Evansville, Indiana 47708
Phone 425-8181
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 415 N. Eighth St. 63101 314-231-4477



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190 NLRB No. 145

D—4940
Evansville, Ind.

United States of America
Before the National Labor Relations Board

| | |
|---|---|
| Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, and Its Agent Charles Tremper<br><br>and<br><br>Associated General Contractors of America, Evansville Chapter, Inc. | Case 25—CB—973 |

## DECISION AND ORDER

On October 1, 1970, Trial Examiner Robert E. Mullin issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that they cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party and the Respondents filed exceptions to the Decision. The Respondents also filed a brief in support of their exceptions, and the General Counsel filed a brief in support of the Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Trial Examiner's decision, the exceptions and the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent they are consistent with the following.

The Trial Examiner found that the Charging Party, Associated General Contractors of America, Evansville Chapter, Inc.,[1] and the Respondent Union, Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO,[2] had for some years written into their collective-bargaining agreements a provision requiring the submission of jurisdictional disputes to the National Joint Board for the Settlement of Jurisdictional Disputes. Through affiliation with their respective parent organizations, Associated General Contractors, Inc. (AGC), and the International Union, both the Charging Party and the Respondent Union were represented on the National Joint Board and were bound by its decisions. The parties' latest bargaining agreement, which by its terms expired on March 31, 1970, contained such a provision.

In September 1969, the National Joint Board was dissolved, and the Charging Party notified the Respondents that the AGC and its local chapter would not be a party to any agreement establishing a new joint board. Consistent with this position, neither the Evansville Chapter nor its parent organization agreed to participate in the Interim Joint Board, which was formed in the latter part of 1969 to replace the defunct board. However, upon dissolution of the National Joint Board the Charging Party attempted to open discussions on the organization of a local facility to settle jurisdictional disputes, but the

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[1] Also referred to herein as Evansville Chapter.

[2] Also referred to herein as Local 103.

Respondents spurned such overtures, indicating that the International Union would not permit participation in an area board.

Shortly after formal negotiations on a new contract began in February 1970, and at all times subsequent thereto, the Respondents rigidly demanded that any new agreement contain a provision for submission of jurisdictional disputes to the Interim Joint Board or the present National Joint Board, which was created in early 1970 as its replacement. The Charging Party replied that it was unwilling to agree to continuation of the identical jurisdictional dispute provision because the AGC was not a party to the Interim Joint Board and would not recognize its successor. However, as more fully set forth in the Trial Examiner's Decision, the Charging Party throughout the course of negotiations was willing to enter into agreement upon the formation of an alternative jurisdictional disputes procedure and offered several counterproposals, all of which were summarily rejected by the Respondents. Upon expiration of the bargaining agreement the Respondent Union struck the Evansville Chapter's employer members, and at the time of the hearing the work stoppages were still in effect. Following commencement of the strikes the parties met in an effort to resolve their differences, but, as it had done before, Local 103 adamantly insisted upon the inclusion of the same jurisdictional disputes provision in the new agreement. In sum, the record amply supports the conclusion reached by the Tiral Examiner that the Respondents insisted to the point of impasse and resorted to a strike to secure agreement that jurisdictional disputes be resolved by submission to the National Joint Board.

Based on these facts, the Trial Examiner further concluded that the Respondent Union restrained and coerced the Charging Party in the selection of its representative for purposes of collective bargaining and the adjustment

of grievances within the meaning of Section 8(b)(1)(B) of the Act. The Respondent Union has excepted to this conclusion, and we find merit in these exceptions.

The Trial Examiner's conclusion that Local 103 violated the Act is predicated on his finding that the subject of jurisdictional dispute settlement mechanisms is a nonmandatory one. It seems to us that there are few matters more properly the subject of collective bargaining than the method of resolving those disputes. We do not view the demand in this case as involving an employer's selection of his representative for purposes of collective bargaining, for the function of any group designated to resolve such jurisdictional disputes is not to negotiate on behalf of the parties before it but is more in the nature of an umpire or a knowledgeable arbitration panel to consider only certain types of problems.[3] It is in this respect that prior Board cases finding violations of Section 8(b)(1)(B) are distinguishable from the instant situation. The cases cited by the Trial Examiner in support of his concluding findings concerned either (a) demands that a company which was a member of and had designated one association discontinue that agency relationship and instead affiliated with a different employer organization and grant it full authority to represent and bind the company for purposes of collective bargaining or the handling of grievances; or, (b) demands for provisions found to be nonmandatory subjects of bargaining such as industry promotion funds.

Indeed, the only case mentioning in any way a demand comparable to that in the present case contains a specific reservation on the point in issue. In **Federated Employers**

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[3] Contrary to the implication of the Trial Examiner's fn. 12, it is quite customary for parties in collective bargaining to exercise their equal voices by agreeing in advance that a particular person or body shall resolve disagreements which may arise in the future.

of Nevada, Inc., 135 NLRB 462, the Board adopted Trial Examiner's Marx's statement[4] that the interpretation of Section 8(b)(1)(B) as including within its scope union action to coerce the company to accept contractual provisions for the selection of management designees not of their choice

> is not intended to imply that coercion to compel an employer to select or agree to an "umpire" . . . is within the reach of Section 8(b)(1)(B). I do not pass on such a situation, confining my holding to a case where, as here, a labor organization seeks to compel an employer to accept management designees, who are not of the employer's choosing, as instruments for the resolution of grievances.

Obviously, coercion of an empolyer in his selection of a representative for bargaining purposes or for such pur-

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[4] Footnote 8, 135 NLRB at 471, which is the page cited by the Trial Examiner herein.

Our dissenting colleagues misread the facts of the cited case. There the joint committee and board of arbitration which were under consideration were at all times except the ultimate stage bipartite bodies, being composed of two members designated by an association of which the employers were not members and two designated by the union, and those bodies were to be authorized to act for the nonmembers in the full gamut of issues that might arise, with an impartial umpire in the final stage. In significant contrast, here the Joint Board is tripartite at all times and includes an impartial chairman. Further, any determination is by a tripartite body consisting of the impartial chairman and disinterested union and employer members, i.e., no regular or alternate member may participate in any case in which the trade union or company of which he is an officer or representative is a party to the dispute, but any union or employer not directly represented may designate a representative to participate in the discussion of the specific case. An appeals board consists of an impartial umpire and disinterested union and employer members not affiliated with any party to the particular case under review. And, as noted above in the text, the matters which may be considered are most limited and could be described as disputes which involve three parties and which cannot be resolved by the agents of those parties in collective bargaining.

poses as the handling of all grievances is a matter which is prohibited by the statute. But, as set forth above, the matter in issue here is not of that nature.

Although we conclude, contrary to the Trial Examiner, that the subject of a mechanism for the resolution of jurisdictional disputes is a mandatory subject of bargaining, and as such one upon which a party may insist to impasse and for which it may engage in a strike,[5] we agree that in the circumstances of this case the Respondent Union violated Section 8(b)(3). This is so because the subject, being a bargainable matter, is one upon which Local 103 was obligated to enter negotiations with an open mind. Here, it is clear, the Respondent Union had a fixed, inflexible position and was rigidly unwilling to consider seriously any possible alternatives to its proposal that such disputes be submitted to the National Joint Board. Such an attitude is clearly contrary to the duty to bargain in good faith and is thus unlawful.

In view of the above, we shall dismiss the complaint insofar as it alleges a violation of Section 8(b)(1)(B) and sustain the allegation that the Respondents violated Section 8(b)(3).

## Conclusions of Law

1. Associated General Contractors of America, Evansville Chapter, Inc., and its members, are employers and are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, and Charles Tremper is its agent, within the meaning of Section 2(13) of the Act.

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[5] **N.L.R.B. v. Wooster Division of Borg-Warner Corporation**, 356 U.S. 342, 349.

3. All journeymen ironworkers and apprentices employed by the employer members of AGC, Associated General Contractors of America, Evansville Chapter, Inc., within the territorial jurisdiction of Local 103, exclusive of all other employees of said employers and all supervisors, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Local 103, at all times material herein, has been, and is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. By refusing to bargain with Associated General Contractors of America, Evansville Chapter, Inc., on the ways and means by which jurisdictional disputes are to be resolved the above-named Respondents have, since February 11, 1970, engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

**The Remedy**

Having found that the Respondents violated Section 8(b)(3) it will be recommended that the Respondents be ordered to cease and desist from such conduct and take certain affirmative action in order to effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local Union No. 103, International Association of Bridge, Structural

and Ornamental Iron Workers, AFL-CIO, its officers, agents, and representatives, and the Respondent, Charles Tremper, its business agent, shall:

1. Cease and desist from:

(a) Refusing to bargain with Associated General Contractors of America, Evansville Chapter, Inc., on behalf of the journeymen ironworkers and apprentices in its territorial jurisdiction who are employed by employer members of the aforesaid Evansville Chapter excluding all other employees and supervisors, with regard to the resolution of jurisdictional disputes.

(b) In any like or related manner refusing to bargain with Associated General Contractors of America, Evansville Chapter, Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) The Respondent Union shall notify Associated General Contractors of America, Evansville Chapter, Inc., in writing, that it will not refuse to bargain with it, and that it will not refuse to bargain on the resolution of jurisdictional disputes.

(b) Post at the Respondent Union's business offices and meeting places, within its territorial jurisdiction, copies of the attached notice marked "Appendix A."[6] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by a representative of Local 103 and by the Respondent Tremper, shall be posted by the Respondent Union imme-

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

diately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Promptly after receipt of copies of the said notice from the Regional Director, return to him signed copies for posting by Associated General Contractors of America, Evansville Chapter, Inc., and by all the employer members of the Evansville Chapter named in "Appendix B," if they be willing, at their places of business, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. June 7, 1971.

EDWARD B. MILLER
Chairman

JOHN H. FANNING
Member

GERALD A. BROWN
Member

(Seal) National Labor Relations Board

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Member Jenkins and Kennedy, dissenting in part:

We agree with our colleagues that the Respondent Union violated Section 8(b)(3) of the Act by taking and maintaining throughout the course of negotiations a fixed position with regard to its demand that all jurisdictional

disputes be submitted to the National Joint Board for final disposition. However, although finding that the Respondent Union resorted to such conduct, including a strike against all employer members of the Evansville Chapter in order to compel acceptance of the Joint Board, upon which neither the Evansville Chapter nor the AGC had any representatives, our colleagues nevertheless conclude that the Respondent Union did not violate Section 8(b)(1)(B). This is so, we are told, because the submission of disputes to the Joint Board is a mandatory subject of bargaining. We do not agree.

In the circumstances of this case we find it unnecessary to decide whether the subject is a mandatory one for bargaining because the Act itself, in Section 8(b)(1)(B), clearly proscribes the conduct engaged in here where the object is "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining **or** the adjustment of grievances" (Emphasis supplied). To avoid the plain meaning of this section it would be required of us to draw a distinction between the selection of representatives for purposes of collective bargaining or adjusting grievances and the selection of representatives for the limited purpose of adjusting jurisdictional disputes, although it is clear Congress made no such differentiation. Moreover, we are not persuaded that there exists, within the purview of Section 8(b)(1)(B), a rational basis for making such a distinction for in each instance the conduct so proscribed inheres in the attempt to compel by restraint or coercion the designation of representatives not of the employer's own choosing regardless of whether the subject matter of the grievance be characterized as limited to "only certain types of problems" or otherwise.[7]

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[7] We believe that the case authority, including our decision in **United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 525, AFL-CIO (Fed-**

Indeed, our colleagues' holding in this case seemingly rewards coercion which is designed to compel acceptance of representatives not of the employer's own choosing although the Board has a longstanding policy recognizing that an employer is as much a "party" to a jurisdictional dispute[8] as he is to any other dispute or grievance. In short, we think it is fundamental that the party to any dispute or grievance be accorded the right to appoint his own representative if the voluntary settlement procedures they may agree upon are to maintain their efficacy. Therefore, in our view, it is irrelevant whether the designees being forced upon the employer are fair and impartial, for Section 8(b)(1)(B) protects the employer's right to select his own representatives for such purposes. It is, of course, a misnomer for our colleagues to call the Joint Board "tripartite," for neither the Evansville Chapter nor the National AGC was represented on the Board, a fact which lies at the root of the violation here.

HOWARD JENKINS, JR.
Member

RALPH E. KENNEDY
Member

National Labor Relations Board

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**erated Employers of Nevada Inc.)**, 135 NLRB 462, cited by the Trial Examiner clearly supports this position, and that the reservation contained in the above-cited case related to the question whether it is violative of the Act to coerce an employer to appoint, pursuant to an agreement, a third party neutral to a tripartite panel on which the employer is already represented . . . an issue not before us in that case or in the instant matter.

[8] See, e.g., **Lathers Union Local 104, The Wood, Wire and Metal Lathers International Union, AFL-CIO (Associated General Contractors of America, Inc., Seattle Northwest Chapter)**, 186 NLRB No. 70.

## APPENDIX A

### Notice to Members

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

It has been determined by the National Labor Relations Board that this local and its agent Charles Tremper have violated the National Labor Relations Act. In order to correct this situation, we have been required to post this notice, and to give the following reassurances.

We Will Not refuse to bargain with Associated General Contractors of America, Evansville Chapter, Inc., on behalf of the journeymen ironworkers and apprentices in our territorial jurisdiction who are employed by employer members of the aforesaid Evansville Chapter, excluding all other employees and supervisors, with regard to the resolution of jurisdictional disputes.

We Will Not, in any like or related manner, refuse to bargain with Associated General Contractors of America, Evansville Chapter, Inc.

Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO
(Labor Organization)

Dated..... By.....
(Representative) (Title)

Dated..... By.....
Charles Tremper, Business Agent

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 317-633-8921.

## APPENDIX B

Aalco Construction Co.
1171 Diamond Avenue
Evansville, Indiana

A & C Construction Co.
New Green River Road
Evansville, Indiana

Allied Erection & Conveyors
R.R. 13, Box 54
Evansville, Indiana

Anderson & Loer
P.O. Box 4168, Sta. "A"
410 W. Iowa
Evansville, Indiana

Anning-Johnson Company
3945 Industrial Boulevard
Indianapolis, Indiana

Bartley & Perigo Masonry
2910 Rugby Avenue
Evansville, Indiana

Bauer Bros. Gen. Contrs., Inc.
912 Prosperity Avenue
P.O. Box 1182, Sta. "C"
Evansville, Indiana

Bee Construction Co.
R.R. 1, Middle Mt. Vernon Rd.
P.O. Box 7097
Evansville, Indiana

Bretz Paint Contracting, Inc.
P.O. Box 5274, Lawndale Sta.
Evansville, Indiana

N.M. Bunge, Inc.
5419 Hogue Road
Evansville, Indiana

Burch & Lamb, Inc.
7703 Bawngart Road
P.O. Box 2226, Sta. D.
Evansville, Indiana

Central Glass Co. of Indiana
1101 Diamond Avenue
Evansville, Indiana

Clark Construction Co.
1919 Parrish Avenue
P.O. Box 623
Owensboro, Kentucky

R. J. Coudret Company
1301 N. Harlan Avenue
P.O. Box 4111
Evansville, Indiana

Crow's Insulating Co.
2102 S. Evans
Evansville, Indiana

Jerry L. David Excavating
1710 Diefenbach Road
Evansville, Indiana

Deig Brothers
2804 "A" Street
Evansville, Indiana

Evansville Sheet Metal
1901 W. Maryland Street
Evansville, Indiana

Feigel Construction Corp.
1270 E. Maxwell Avenue
Evansville, Indiana

Connie Garnett Contracting
1600 S. New York Avenue
Evansville, Indiana

General Insulation Co.
609 N. Weinbach Avenue
Evansville, Indiana

Hartz Brothers
P.O. Box 1157
Owensboro, Kentucky

Harts-Kirkpatriek Constr.
P.O. Box 1328
Owensboro, Kentucky

Harvey Johnson Painting
808 Monroe Avenue
Evansville, Indiana

Hicks & Son, Inc.
2559 N. Kentucky Avenue
Evansville, Indiana

Industrial Contractors, Inc.
P.O. Box 208
401 N.W. First Street
Evansville, Indiana

Key Construction
2201 Covert Avenue
Evansville, Indiana

Geo. Koch Sons, Inc.
10 S. 11th Street
P.O. Box 358
Evansville, Indiana

Louisville Insulating Co.
509 N. 9th Avenue
Evansville, Indiana

Midwest Roofing & Insulation
1208 N. Harlan Avenue
Evansville, Indiana

Municipal Eng. & Constr.
4424 Vogel Road
Evansville, Indiana

Nelson-Klinger Co.
P.O. Box 831
Evansville, Indiana

H. G. Newman Plumbing
211 S.E. Fourth Street
Evansville, Indiana

Chris Nix Construction Co.
322 South Ingle Avenue
Evansville, Indiana

P & H Construction Co.
P.O. Box 37
1157 E. Sycamore
Evansville, Indiana

D.K. Parker Co., Inc.
P.O. Box 486
New Harmony, Indiana

Peyronnin Construction
1901 N. Kentucky Avenue
P.O. Box 3317
Evansville, Indiana

Poe Steel Erection
3028 N. Fulton Avenue
Evansville, Indiana

Red Spot Paint & Varnish
110 Main Street
P.O. Box 418
Evansville, Indiana

Rust Construction Co.
1301 E. Michigan Street
P.O. Box 994
Evansville, Indiana

Ryan Contracting Co.
5416 Boonville Hwy.
P.O. Box 5047, Lawndale
Evansville, Indiana

Geo. Ryan Company
5650 Oakgrove Road
P.O. Box 5114, Lawndale
Evansville, Indiana

Sutton Construction Co.
1716 S.E. Boulevard
Evansville, Indiana

Traylor Brothers
835 N. Congress Avenue
P.O. Box 5165
Evansville, Indiana

Tri-State Steel Erection
1324 N. Fares Avenue
Evansville, Indiana

U.S. Sheet Metal & Roof
1701 First Avenue
Evansville, Indiana

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 15, 1972

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. John Paul Stevens, Circuit Judge

Hon. William J. Campbell, Senior District Judge

Associated General Contractors of America, Evansville Chapter, Inc., Petitioner,

No. 71-1480 vs.

National Labor Relations Board, Respondent,

and

Local Union No. 103, Int. Ass'n of Bridge, Structural & Ornamental Iron Workers, et al., Intervenors.

National Labor Relations Board, Petitioner,

No. 71-1575 vs.

Local Union No. 103, Int. Ass'n of Bridge, Structural & Ornamental Iron Workers, et al., Respondents.

On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board.

**ORDER**

On consideration of the petition of the intervenors in Cause No. 71-1480 and the Respondents in Cause No. 71-1575, for a rehearing by the Court *en banc* in the above-

entitled appeals, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of the Intervenors in Cause No. 71-1480 and the Respondents in Cause No. 71-1575 for a rehearing in the above-entitled appeals be, and the same is hereby denied.

FILED
NOV 29 1972

In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-667

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, and its Agent CHARLES TREMPER,

*Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.,

*Respondents,*

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

## BRIEF FOR RESPONDENT ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC. IN OPPOSITION

JOSEPH A. YOCUM
305 Union Federal Building
Evansville, Indiana 47708

*Attorney for Respondent, Associated General Contractors of America, Evansville Chapter, Inc.*

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In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-657

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, and its Agent CHARLES TREMPER,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD and ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.,

*Respondents,*

**ON PETITION FOR A WRIT OF CERTIORARI**
**To the United States Court of Appeals**
**For the Seventh Circuit**

## BRIEF FOR RESPONDENT ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC. IN OPPOSITION

JOSEPH A. YOCUM
305 Union Federal Building
Evansville, Indiana 47708

*Attorney for Respondent, Associated General Contractors of America, Evansville Chapter, Inc.*

## GENERAL STATEMENT

Respondent, Associated General Contractors of America, Evansville Chapter, Inc., does not oppose the formal parts of Petitioner's Brief as they outline the opinion below, jurisdiction, questions presented, constitutional provisions and statute involved, and statement of the case. Because of this it would serve no useful purpose to repeat these matters save to note they generally state the matters before this Court with one notable exception. As shown by Petitioner's supplemental appendix, the Board's Trial Examiner and two of its members were in total agreement with the Decision of the Court of Appeals for the Seventh Circuit on the matter of Section 8 (b) (1) (B) violation of the Act in this case and, in fact, the Board is not seeking a writ of certiorari in this case.

## REASONS FOR NOT GRANTING THE WRIT

Basic to the incorrect assumptions contained in both points argued by Petitioner is the simple fact that the Board has not chosen to seek a writ in this case and its Trial Examiner and two of its members agreed in total with the Decision of the Court below on the 8 b) (1) (B) violation and all were in agreement on the 8 (b) (3) violation. Thus, the citations used in the first portion of Petitioner's brief with reference to deference to the Board's view of labor policy are not appropriate.

Similarly, were the petition granted and Petitioner's point of view sustained, those provisions in the Act relating to procedures for the settlement of jurisdictional disputes would, in effect, be repealed. In this

respect it should also be noted that Petitioner misses the thrust of the decision of the Court below and of its administrative brethren in that the concern here is a one-sided control of the panel who might or might not select someone to decide a given jurisdictional dispute, not the simple fact of selection. As the record shows beyond doubt, this Respondent would have no voice in the composition of the selecting agency, a right expressly given it by Section 8 (b) (1) (B) of the Act.

Petitioner's second point, the constitutional issue, is similarly without basis in fact or in law. Petitioner's emphasis on *H. K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970) is totally misplaced, since this Court merely decided that subjects not otherwise controlled by the Act or applicable law were subject to full and free collective bargaining. Finally, were Petitioner's position sustained, as observed by the Court below, this Court's teachings in *N.L.R.B. v. Plasterer's Union*, 404 U. S. 116 (1972) as to the importance of jurisdictional disputes in the statutory format established by Congress would be destroyed. This is particularly so if the attempt to gain total control of jurisdictional dispute procedures, the Section 8 (b) (1) (B) violation, were not also found, as both the Court below and the Board without dissent decided, to be an unlawful refusal to bargain under Section (8) (b) (3) of the Act.

## CONCLUSION

For the foregoing reasons, Respondent, Associated General Contractors of America, Evansville Chapter, Inc., respectfully asks that the Petition be denied.

Respectfully submitted,

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Evansville, Indiana 47708

*Attorney for Respondent,*
*Associated General Contractors of*
*America, Evansville Chapter, Inc.*

November 27, 1972

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-657

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, AND ITS AGENT CHARLES TREMPER, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD AND ASSOCIATED GENERAL CONTRACTORS OF AMERICA, EVANSVILLE CHAPTER, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The National Labor Relations Board (two members dissenting) held that Local 103 (the Union) did not violate Section 8(b)(1)(B) of the National Labor Relations Act[1] by bargaining to impasse, and then

[1] This section makes it an unfair labor practice for a labor organization to restrain or coerce "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

striking, to compel the Associated General Contractors, Evansville Chapter (the Association) to agree to a contract clause providing that jurisdictional disputes be resolved by the National Joint Board for the Settlement of Jurisdictional Disputes, on which the Union—but not the Association—was represented.[2] In the Board's view, the demand in this case did not involve "an employer's selection of his representative for purposes of collective bargaining, for the function of any group designated to resolve such jurisdictional disputes is not to negotiate on behalf of the parties before it but is more in the nature of an umpire or a knowledgeable arbitration panel to consider only certain types of problems." 190 NLRB No. 145, p. 2. The Board found, however, that the Union's negotiating stance concerning the mechanism for resolving jurisdictional disputes was fixed and inflexible, and thus that it had failed to bargain in good faith in violation of Section 8(b)(3) of the Act. *Id.*, pp. 6–7.

2. The court sustained the Board's finding that the Union refused to bargain in good faith, but held that the Union had violated Section 8(b)(1)(B) of the Act (Pet. App. A1–A14). The court concluded that the statutory phrase "adjustment of grievances," in Section 8(b)(1)(B), is broad enough to include the adjustment of jurisdictional disputes, noting that

[2] That Board, established by the Building Trades Department of the AFL–CIO and certain employer groups, is comprised of an equal number of employer and union designees under the chairmanship of an impartial member. The National Association, which originally was a member of this body and of which the Evansville Chapter is a subsidiary, withdrew in September 1969 (Pet. App. A2).

"jurisdictional disputes involve actual labor grievances in which the employer may be vitally interested and to which he is a party" (Pet. App. A7). The court also rejected the Board's finding that the Joint Board functioned as an "umpire" in resolving jurisdictional disputes. Rather, the court ruled that "only the Chairman [of the Joint Board] is truly impartial"; the employer members of the tripartite Joint Board panels are "expected to espouse the viewpoint of the employer party," and thus they functioned as the employer's "representatives" within the meaning of Section 8(b)(1)(B) (Pet. App. A9).[3] The court accordingly remanded the case to the Board to issue an order "restraining the violation of "Section 8(b)(1)(B) of the Act, and to "restrain also the violation of Section 8(b)(3) inherent in the Union's insistence that the Association agree to the resolution of jurisdictional disputes by a tripartite board on which the Association is unrepresented" (Pet. App. A14).

[3] The court found that the provisions of the Joint Board plan at issue here expressly stated that the employer members functioned as "representatives" of employer disputants (Pet. App. A7–A8).

3. The basic question presented by the petition is whether the court properly concluded that the employer members of the National Joint Board for the Settlement of Jurisdictional Disputes serve as the representative of the employer involved in a jurisdictional dispute, and not merely as an umpire. Although the Board believes that the court of appeals should have accepted its conclusion, it did not petition for certiorari because, in its view, the difference between the Board and the court turns essentially on a differing evaluation of the facts of this particular case and does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board.*

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972